

FILED.
JAN 12 1910
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909

No. **5**

RICKEY LAND AND CATTLE COMPANY, PETITIONER,

vs.

HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES
SNYDER, AND CHARLES JOHNSTON, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENTS.

W. B. TREADWELL,
Solicitor for Respondents.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
FRANK H. SHORT,
ISAAC FROHMAN,
EDWARD F. TREADWELL,
Of Counsel.

(21,056)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 94.

RICKEY LAND AND CATTLE COMPANY, PETITIONER,

vs.

HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES
SNYDER, AND CHARLES JOHNSTON, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENTS.

The most important questions in this case are precisely the same as those in the case of *Rickey Land & Cattle Co. v. Miller & Lux*, No. 89 on the docket of this court for the present term, and it seems to us unnecessary that we should here cover the ground already covered in that case. Therefore we beg leave to refer to respondent's brief on the merits in that case for our argument as to the matters common to both cases without further reference to those matters here.

As we have not yet seen petitioner's brief on the merits in the present case, we shall be compelled to assume that the points to be made by it on this argument are those indicated

by it on its application for the writ of certiorari herein and raised by it in the courts below.

As in case No. 89, this is an appeal from an interlocutory injunction granted by the United States Circuit Court for the District of Nevada in aid of its prior jurisdiction in the case of *Miller & Lux v. Rickey*, restraining the Rickey Land & Cattle Co., as a privy to, and purchaser *pendente lite* from, Thomas B. Rickey, a defendant therein, from prosecuting two subsequent actions brought by it in the Superior Court of Mono County, California. The only difference between this case and case No. 89 is that the suit in No. 89 was commenced by Miller & Lux, the *complainant* in *Miller & Lux v. Rickey*, while the suit here involved was commenced by the respondents here, who were *defendants* in the suit of *Miller & Lux v. Rickey*, and who had filed cross-bills therein against their codefendant, Thomas B. Rickey. Those cross-bills were filed therein, and process thereon actually served on said Rickey after the commencement of said actions in the State court, but before process in said last-mentioned actions had been served. Thereupon said cross-complainants (respondents here) filed the bill here in question, *ancillary* to the original suit of *Miller & Lux v. Rickey*, to obtain the injunction here appealed from. All the other facts in this case are the same as in case No. 89.

As will be seen, the position of the respondents herein, as *defendants* and *cross-complainants* in *Miller & Lux v. Rickey*, constitutes, in the opinion of counsel for petitioner, a material difference between the two cases, 89 and 94, and he contends that, even if it should be held that the injunction granted in favor of Miller & Lux, the complainant in the original suit, was properly granted, such is not the case as to the injunction in favor of these respondents. In that behalf, he contends, *first*, that our cross-bills were improper, and gave us no standing as against Rickey, and, *second*, that as those cross-bills were filed after the commencement of the actions in the State court, they conferred no right to this injunction, although the process on them was the first served.

In this brief we shall contend:

I.

1. That those cross-bills were regular and jurisdictionally sufficient against Rickey;

II.

2. That the Circuit Court had priority of the controversy involved in those cross-bills, because:

(a) They were protected by its original priority in the suit of *Miller & Lux v. Rickey*; and

(b) The fact that process on these cross-bills was served before process was served in the actions in the State court gives them priority.

For all other points we ask leave to refer to respondent's brief in case No. 89.

ARGUMENT.

I.

THE CROSS-BILLS HERE IN QUESTION WERE REGULAR AND JURISDICTIONALLY SUFFICIENT AGAINST RICKEY.

As we understand, counsel for petitioner does not dispute the general rule that in a suit in equity a defendant may file a cross-bill against a codefendant, and that, indeed, he must do so if he desires to obtain affirmative relief against him. But he contends that in the Federal courts, when the defendants are, as here, citizens of the same State, such a cross-bill must be *purely defensive*; that it must relate *solely* to the very controversy initiated by the original bill, and must set up no other controversy, even though relating to the same subject-matter. In other words, he says that such a cross-bill must confine itself to stating matters constituting a defense,

or in aid of a defense, to the claim of the original complainant, and that if it sets up any other controversy, however germane to the suit, it is as to such matter an *original bill*, and to that extent bad for want of jurisdiction.

We are not concerned here to inquire whether or not the rule is as counsel so claims, except to say that even under the authorities which he cites he has narrowed it too much, and that it is entirely proper for such a cross-bill to set up any matter which will enable the court to do more exact or complete justice between the parties *with relation to the controversy brought before the court by the original complainant*. Such a matter would, of course, be defensive, and we understand that counsel does not dispute the correctness and necessity of the addition of such a qualification to the rule he claims. For the purpose of this argument only, then, we are willing to concede the correctness of the rule so stated by counsel, with the qualifications we here suggest, and we believe that we can easily show that our cross-bills are proper and valid, even according to that supposed rule.

By said cross-bills (pages 7-8) these respondents claimed certain rights to the water of Walker River, and complained of certain wrongful diversions of said water by said Rickey above their lands and ditches, and sought to restrain such diversions by him. That such allegations and prayers did tend to enable the court to do more exact and complete justice between the parties *with relation to the claim of Miller & Lux* may be well illustrated by putting a supposed case somewhat simpler:

Suppose that A brings his bill against B and C, in which he alleges that he is a proprietor on a stream, and entitled at all times to divert 10 feet therefrom, and that the defendants, B and C, without right, but under claims of right, are diverting the waters of the stream above him, and thus preventing any water from reaching him, and he therefore prays an injunction against them. B and C severally *answer*, each admitting that he is diverting 10 feet from the stream, and

seeking to justify that diversion by a completed right of appropriation. There being no pleading but bill and answers, the court on the hearing finds the facts to be that A, B, and C are each appropriators, each having lawfully appropriated 10 feet; that A is first in priority, B is second, and C last, and that C is the highest up the stream, B next, and A lowest down, and the injunction prayed for by A is granted. A subsequently complains that B has violated the injunction, and has him cited for contempt. On the hearing of the contempt proceeding it appears that C has been diverting 20 feet and B 10 feet at a time when there was only 30 feet in the stream. As the result of those *combined* diversions, A has been totally deprived of water. B contends that he has committed no wrong; that he has only taken the quantity which he had been adjudged entitled to take, and that there would have been enough water for A had it not been for the wrongful excess diverted by C. He therefore claims that C is the one, and the only one, to be punished. But the court says to him: "No, you yourself have violated the injunction, and must bear the consequences. You cannot compel the complainant to proceed against C if he chooses not to do so. Had you filed a cross-bill against C, *you* could have had him enjoined, and thus protected yourself against what must be admitted to be an unjust use of the injunction granted to A; but you did not do so, and there is now no way in which you can be relieved."

In the supposed case no one would deny that an injustice had been done to B; that that injustice was caused by the relief granted to A, and that there ought to be *some* way by which such injustice could be prevented. Is it not true that there *is* such a way, and that such a cross-bill as we have supposed the courts to have suggested would have been strictly defensive, and solely designed to enable the court to do complete justice between the parties as to the very controversy initiated by A? Without such a cross-bill, there is no way in which truly *equitable* relief can be granted, for the

complainant in such a case is entitled to treat every wrongdoer as a several trespasser if he desires, and cannot be compelled to proceed against them jointly, nor to proceed against any one of them against his will.

The cross-bills filed by us in this case are exactly of the nature of those in the case supposed. Rickey is above us on the river, and stands in the place of the imaginary C. Unless we can maintain these cross-bills Miller & Lux, should it establish the priority it claims, will be able to punish us for the acts of Rickey, and the decree which the court must render, although such as *Miller & Lux* may be strictly entitled to, will not do exact or complete justice between the parties. We submit, therefore, that our cross-bills are strictly defensive in their nature; that our controversy with Rickey is a part of the very controversy brought before the court by the original bill of Miller & Lux, and that these cross-bills are therefore proper and valid, even according to the test suggested by counsel.

This proposition was expressly so decided in the like case of *Ames Realty Co. v. Big Indian M'g Co.*, 146 Fed., 166, 169, in which case a similar illustration was given, and we submit that reason and equity imperatively demand such a rule.

II.

THE CIRCUIT COURT HAD JURISDICTION OF THE CONTROVERSY INVOLVED IN THESE CROSS-BILLS PRIOR TO THAT OF THE STATE COURT.

(a) *The cross-complainants were protected by the original priority of the Circuit Court in the suit of Miller & Lux v. Rickey.*

If we are right in what we have said under the preceding head, our cross-bills were strictly defensive, and were therefore merely an ordinary step in the case, like an answer, re-

lating to the controversy of which that court had already acquired prior jurisdiction, and not initiating any new controversy. The actions in the State court were therefore attempts to give to the State court jurisdiction of a controversy already *pending* in the Circuit Court.

(b) *The fact that process on these cross-bills was served before process was served in the actions in the State court gives priority to those cross-bills.*

Except in a very limited class of cases, of which this is not one, the question of priority of jurisdiction depends solely upon the respective dates of service of process.

Bell v. O. L. & T. Co., Fed. Cas., 1260.

Union Mut. Life Ins. Co. v. University of Chicago,
6 Fed., 443.

Owens v. O. Cent. R. Co., 20 Fed., 10.

U. S. v. Lee, 84 Fed., 626, 631.

U. S. v. Eisenbeis, 112 Fed., 190, 196.

In the court below counsel for petitioner cited the case of *Farmers' Loan & Trust Co. v. Lake Street, &c., R. Co.*, 177 U. S., 51, as declaring a principle which would take this case out of the operation of the above rule. But that case contains nothing applicable to the present one. It merely decides that in suits *in rem*, and those which in their nature may compel the court to take possession of property to be affected, the mere filing of the bill and issuance of process gives the court jurisdiction of the *res*. The language of that case, cited by counsel, is as follows (page 61):

"As between the immediate parties, in a proceeding *in rem*, jurisdiction must be regarded as attaching when the bill is filed and process has issued, and where, as was the case here, the process is subsequently duly served in accordance with the rules of practice of the court. * * *

"Nor is the rule restricted in its application to cases where property has been actually seized under ju-

dicial process before a second suit is instituted in another court; but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected."

It is obvious that this case is not within the rule there laid down. The actions brought by the petitioner in the State court were not *in rem*, nor within any of the other categories mentioned in that case, nor *could* that court have lawfully assumed the possession or control of any property in those cases, nor was it asked to do so. Those actions, as well as the one in the Circuit Court, being only *in personam*, priority in the service of process must control.

We submit that the order appealed from was rightly affirmed by the Circuit Court of Appeals.

Respectfully submitted,

W. B. TREADWELL,
Solicitor for Respondents.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
FRANK H. SHORT,
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SUPREME COURT OF THE UNITED STATES.

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No. 94.

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vs.

HENRY WOOD, JAMES O. BIRMINGHAM, CHARLES
SNYDER, AND CHARLES JOHNSON, RESPONDENTS.

SUPPLEMENTAL BRIEF FOR RESPONDENTS.

I.

Abatement or Stay of an Action.

"It is an ancient rule of the common law that a man shall not be *twice vexed* for one and the same cause; and the pendency of a former suit in the same jurisdiction between the same parties for the same cause of action and relief may be pleaded in *abatement* of a second suit."

Ency. Pl. & Prac., vol. 1, title "*Another Suit Pending*," p. 750.

But—

"It is a proper ground for *continuance* that the debt for which the suit is brought has been attached

"in a prior and pending action in the same or in another state by a creditor of the plaintiff."

Ibid., p. 767, citing—

Winthrop v. Carlton, 8 Mass., 256.

Harvey v. Great Northern R. Co., 50 Minn., 405.

Blair v. Hilgedies, 45 Minn., 23.

Lynch v. Hartford Fire Ins. Co., 17 Fed. Rep., 627, and other cases.

This upon the ground that the *res* is within the jurisdiction of the court wherefrom attachment issued.

So here, the *res*, to wit, the land of the complainant; its water rights and the locus of the water, to wit, Walker River, are all within the limits of the jurisdiction of the Nevada Circuit Court. The bill thus stated a case within such jurisdiction. The defendants' plea denies the jurisdiction only in respect of water flowing in California. The *relief* prayed is one thing—the defense another. If the court has power to grant relief because of the status of the parties, the injury and damage being admittedly located in Nevada, then the entire cause is within its jurisdiction. The order entered in each case (89 and 94) only directs the defendants to cease from prosecuting the suits in the California State Court "pending the final hearing and determination of this suit" and until the further order of the court."

R., 89, p. 29; R., 94, p. 21.

We also call particular attention to the case of *French, trustee, vs. Hay*, 22 Wall., 250, cited in the opinion below in No. 89 (R., 48, 49). There injunction issued to restrain the defendant from prosecuting in the courts of another jurisdiction a suit founded upon a judgment he had wrongfully obtained from a State court, when such latter cause had been lawfully removed into the Federal Court. Such power was assumed and exercised to prevent a manifest injustice, the court declaring—

"Having the possession and jurisdiction of the case,
"that jurisdiction embraced everything in the case

“and every question arising which could be determined in it, until it reached its termination and the jurisdiction was exhausted.”

II.

Concurrent Jurisdiction.

The petitioner's counsel claim that the California court has sole jurisdiction over Miller & Lux—the original claimants in the Nevada suit—to determine their rights to any water in the Walker River in California, although their diversion of such water occurs in Nevada. Clearly, therefore, the Nevada court in turn has jurisdiction to determine the rights of the same complainants in the same stream and *its* jurisdiction was first invoked. The argument at the bar and on the briefs is that the California court can and may decree *in result* the rights of all parties in the Nevada case to the use of the water flowing in Walker River, and hence it may so decree that *no water* could reach Nevada and the interstate stream in Nevada would of course disappear.

Now it is settled law that there can be no right in the *corpus* of water flowing naturally. Such rights arise by diversion and use. The argument then is that a flowing object, precisely as an immovable object, such as land, appertains to the jurisdiction alike, so that water, when it enters a State, is within the sole jurisdiction of that State and subject to complete exhaustion of the stream by use to the extent that no jurisdiction attaches thereto in any possible way in the lower State through which the *water-course* in its natural state would pass. If that be the result, then the courts of the lower State could adjudicate nothing thereover—simply because on such doctrine there would be no physical *res* on which its process could operate. But it is not alleged here as a *fact* that there is no water flowing in the Walker River in Nevada. The original bill R., 89, par. 7, p. 3) avers diversion “of a large portion of said water to which your

"orator is so entitled." With the land of complainant situate in Nevada, its water right used there and the alleged damages committed there, then clearly the Circuit Court for Nevada can hear and determine whether the complainant's rights in Nevada are in fact injured regardless of the *locus* of the *cause* of such injury. Otherwise both *res* and *jurisdiction* are transferred entirely to California solely because that State is situate higher up on an interstate stream flowing through each State, and may appropriate all the water thereof. Of course, if that contention be sound law, the jurisdiction of the court in the lower State would be extinguished by the physical fact of entire appropriation of the stream in the upper (California) State.

But as a water-course running through both States is common to both, then it must follow that there is concurrent jurisdiction over the water stream as such, and the rule would hence justly obtain that the court first obtaining jurisdiction of the matter would retain such exclusive jurisdiction until final determination of the cause.

Shelby v. Bacon, 10 How., 56, 68.

In *Wiel on Water Rights in the Western States* (second edition, pages 168-175), under the title "Interstate Streams," appears a statement of the rulings of the courts of the arid States then (1908) announced on this important subject, including a full statement of what the court decided in *Willey v. Decker* (11 Wyoming, 496; 100 Am. St. Rep., 939; 93 Pac., 210), cited on our main brief in No. 89.

And, at page 311, the same author briefly discusses "*Where suit can be brought—Jurisdiction*," with citation of the two cases also on our main brief, and to the result contended for by us.

In *Kansas v. Colorado*, 206 U. S., 46 (at page 85), this court said:

"The right to a flow of a stream was one recognized
"at common law for a trespass upon which a cause
"of action existed."

And, at pages 103, 104, the court quotes at length from the opinion of Chief Justice Shaw in *Elliott v. Fitchburg Railroad Company*, 10 Cush., 191, 193, 196, as quoted in turn from *Clark v. Allaman*, 71 Kansas, 206, wherein that eminent jurist clearly states the common-law rule *in extenso*, saying, *inter alia* (page 104) :

“That a portion of the water of a stream may be
 “ used for the purpose of irrigating land, we think is
 “ well established as one of the rights of the pro-
 “ prietors of the soil along or through which it
 “ passes. Yet a proprietor cannot under color of that
 “ right, or for the actual purpose of irrigating his
 “ own land, wholly abstract or divert the watercourse,
 “ or take such an unreasonable quantity of water, or
 “ make such unreasonable use of it, as to deprive
 “ other proprietors of the substantial benefits which
 “ they might derive from it, if not diverted or used
 “ unreasonably. * * *

“This rule, that no riparian proprietor can wholly
 “ abstract or divert a watercourse, by which it would
 “ cease to be a running stream, or use it unreasonably
 “ in its passage, and thereby deprive a lower proprie-
 “ tor of a quality of his property, deemed in law in-
 “ cidental and beneficial, necessarily flows from the
 “ principle that the right to the reasonable and bene-
 “ ficial use of a running stream is common to all the
 “ riparian proprietors, and so, each is bound so to use
 “ his common right, as not essentially to prevent or
 “ interfere with an equally beneficial enjoyment of
 “ the common right, by all the proprietors. * * *

“The right to the use of flowing water is *publici*
 “ *juris*, and common to all the riparian proprietors;
 “ it is not an absolute and exclusive right to all the
 “ water flowing past their land, so that any obstruc-
 “ tion would give a cause of action: but it is a right
 “ to the flow and enjoyment of the water, subject to
 “ a similar right in all the proprietors, to the reason-
 “ able enjoyment of the same gift of Providence. It
 “ is, therefore, only for an abstraction and depriva-
 “ tion of this common benefit, or for an unreasonable
 “ and unauthorized use of it, that an action will lie.”

This doctrine must apply between the States as "interstate common law" and as between individuals of different States claiming rights to the use of water of interstate streams. For such unlawful diversion a court of equity may (as here) exercise its jurisdiction to hear, determine, and restrain parties where injury to one is done or threatened by another *if* the court has jurisdiction of the parties, and certainly where there is the added fact that the injury is done to the land of an owner within its jurisdiction. To deny that right is plainly to put it in the power of one State, by its statutes, or its courts by rulings, to *in fact* ignore and deny this right to equal enjoyment of nature's gift.

The question as presented in this class of cases is *sui generis*. It is an attempt to apply the law respecting immovable property to a flowing stream, and then assert thereon an exclusive jurisdiction merely because the upper State on an interstate stream *happens* to enjoy the advantage of location merely. As said in *Willey v. Decker, supra*, and other cases, *water*, unlike *land*, knows no State boundaries. When, then, a court of equity has jurisdiction of a case involving this *movable* object and is called upon to determine rights thereunder, it is going far to deny the right of prior adjudication to that court on the ground that a court of another jurisdiction over a subject of common interstate right and ownership has been later invoked in effect to determine the same relative rights *inter partes*. It is far less difficult and far less productive of unseemly judicial conflict, if it be held in such a case as is here presented that the *res* is in fact within the jurisdiction of the court whereto the parties have first resorted, and hence draws with it the right in such court to ascertain and determine the rights of those seeking relief at its hands. When the use of the water is matter of common right it must follow logically that the protection of such right, *inter partes*, is matter of concurrent judicial power or jurisdiction and priority of suit, hence gives priority of adjudication in the court of either State wherein this common

and equal right of use extends. If the law be an advancing science to meet the development of human needs, *this* conclusion does not destroy the ancient landmarks nor uproot established principles. *Contra*, it stands approved by reason far more than to hold subject to the law of mere procedure affecting immovable property the waters of a flowing stream, which are so vital an element in human existence.

It may be pertinently added that proceedings in California to adjudicate water rights are brought under section 738 of the Civil Code of that State as in equity, and as pointed out by this court in *Devine v. Los Angeles*, 202 U. S., 313, 333, the court adding:

"This statute enlarged the ancient jurisdiction of courts of equity in respect of suits to quiet title, but the equitable rights themselves remaining, the enlargement thereof may be administered by the circuit courts of the United States as well as by the courts of the State. *Broderick's Will*, 21 Wall., 503; *Holland v. Challen*, 110 U. S., 15; *Gormley v. Clark*, 134 U. S., 338, 348."

As the original suit by respondent in No. 89 in the United States Circuit Court for Nevada is also in equity, the issues and the relief prayed in one are in fact and legal effect that sought in the other. They hence seek a common purpose, over common subject-matter, and, in respect of property (water), of common interstate right, to wit, an interstate stream having movable *locus*.

III.

Petitioner Bound as Purchaser Pendente Lite.

In addition to the argument upon the main brief in No. 89, pages 29, 31, on this head (adopted by reference in the brief in No. 94), we add only one further suggestion.

Thomas B. Rickey, defendant in the original suit, is the president of the Rickey Land and Cattle Company, petitioner

herein. That appears from his signature as such in this record (No. 89, R., 31; No. 94, R., 27). This was notice to the company and binds it *pendente lite*. This point was directly involved and so directly ruled in *Whiteside v. Haselton*, 110 U. S., 296, 300, where, in speaking of a decree against Haselton, it was said:

"It is argued that it does not bind the Bartow Iron Company, who were innocent purchasers from Haselton. But they bought *pendente lite*, and by the well-known rule on that subject, are bound by this decree. The suit was commenced December 5, 1874, Haselton's answer filed April 14, 1875, and the deed, though without date, from Haselton to the company, is acknowledged September 8, 1875.

"It is apparent also that during all the time Haselton was president of the Bartow Iron Company. The fact that the corporation was organized under the laws of another State does not, under these circumstances, relieve it from the rule which governs purchase of property pending litigation about the title."

The original bill of Miller & Lux was filed and process served on Rickey on June 10, 1902. Thereafter, it asserts, viz., August 6, 1902, Rickey—

"caused the defendant (in present bill) the Rickey Land and Cattle Company, to be organized and incorporated, and it was on that day organized and incorporated under the laws of the State of Nevada."
(No. 89, R., 2, 3; No. 94, R., 4, pars. 11 and 12.)

On these facts, which are not denied, the rule as applied in *Whiteside v. Haselton*, *supra*, is plainly applicable.

IV.

The Cross - Bill.

Our main brief (pages 3, 6) clearly discloses wherein the cross-bill is strictly defensive, and hence material to a decree which will do exact justice between all the parties litigant. The same line of reasoning is set forth in the opinion of the Circuit Court of Appeals (R., 32-35). If all parties be enjoined as prayed and violation of such injunction be thereafter alleged and found, the parties so enjoined, who may be innocent of such wrong-doing, would be otherwise made to suffer unfairly by a purely blanket decree. To avoid such consequences these defendants had the right to file their cross-bill, because it was (1) germane to the original bill and (2) essential to a just decree therein protecting them from subsequent harm. Hence, in such a case as this, where *several* ~~divisible~~ interests in running water were asked to be determined, *priority* and *quantity inter partes* were matters of plain and necessary judicial inquiry and resulting decree. It was equally matter of defense. The cross-complainants were entitled, if enjoined, to be clearly and definitely advised by such decree of the precise limitations of such order *as against them and against each other*. Such being the plain legal effect of the cross-bill as pleaded, the argument that further express averments are essential to sustain the certain and necessary conclusions to be drawn from the pleadings is unsound.

No case, we submit, is cited which justifies opposing counsel's contention.

Nor is it true that the Circuit Court, having once obtained jurisdiction, can lose it because the complainants and defendants in the cross-bill are all citizens of Nevada, or that on such ground the relief prayed therein cannot be administered. The rule is well settled that where jurisdiction of a cause in a Federal court is once obtained by diverse citizenship

existing when the suit was commenced, it is not thereafter lost if such diverse citizenship should cease by subsequent change of domicil.

Morgan v. Morgan, 2 Wheat., 290, 297.

Koenisberger v. Richmond Silver Min. Co., 158 U. S., 41-49.

Louisville N. A. & C. Co. v. Louisville Trust Co., 174 U. S., 552, 566.

The same rule obtains here. As the jurisdiction by diverse citizenship *alone* properly attached when the suit was commenced, the court has full power to administer all relief—legal or equitable, as the nature of the suit may permit. Hence, if the cross-bill is *otherwise* unobjectionable, the fact that it is filed after proper commencement of the suit and is on its face between citizens of the same State could not on reason or authority defeat the right to relief therein prayed. The rule is the other way.

Stewart v. Dunham, 115 U. S., 61, 64.

Phelps v. Oakes, 117 U. S., 236, 240.

Harenbergh v. Ray, 151 U. S., 112, 118.

In *Jones v. Andrews*, 10 Wall., 327, 333, the court, speaking of the case there under review, said:

“The case in this respect, as before said, is analogous to that of a cross-bill or bill of review, or a bill of injunction against a judgment at law in the same court, of which the court has jurisdiction, irrespective of the residence of the parties.”

Careful reading of the decision of Judge Hunt in *Ames Realty Company v. Big Indian Min. Co.*, 164 Fed., 166, will disclose that the case is not susceptible of the limited interpretation sought to be put thereon by opposing counsel. The action provided in the statute of the State there cited was distinctly one at law. Manifestly an action at law, without the aid of such statute, could not have been thus

brought, tried, and determined. It was hence considered and ruled by the circuit judge that equity procedure, as administered in the Federal courts, was adapted to the purpose of the Montana statute in respect of actions at law. Manifestly the Montana statute was an unnecessary enactment if limited to proceedings in equity. *Contra*, it was merely the adoption of the rule of equity providing for the granting of full relief, and made thereby applicable to an action at law involving conflicting rights to the use of water. The extended discussion found in Judge Hunt's opinion demonstrates ~~it~~ *the* full application *of the rule* here.

We submit the decree should be affirmed.

W. B. TREADWELL,
Solicitor for Respondents.

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